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Brf. of Howe & Spencer for Pl. in Err.

Filed Nov. 26, 1900.

IN THE

United States Supreme Court,

OCTOBER TERM, 1900.

No. 119 (114).

THE DRAINAGE COMMISSION OF NEW ORLEANS, - - Plaintiff in Error.

VERSUS

MISS LUCRETIA B. WILDER, et als., Defendants in Error.

Brief of Plaintiff in Error on the Merits.

WILLIAM WIRT HOWE,
WALKER B. SPENCER,
Of Counsel for Drainage Commission of New Orleans, one of the Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 119 (114).

THE DRAINAGE COMMISSION OF NEW ORLEANS,
PLAINTIFF IN ERROR,

versus

MISS LUCRETIA B. WILDER ET ALS.,
DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON THE MERITS.

The motion of the defendants in error to dismiss or affirm was submitted at the last term of this Court and referred to the merits.

The important points in the litigation, so far as Federal questions are involved, have been discussed in the brief submitted by the undersigned counsel for the Drainage Commission in October and November, 1899; and we may be permitted to also refer to the brief filed on that occasion by the counsel for the Board of Liquidation.

Briefly stated, the case in the Civil District Court for the Parish of Orleans, which was the court of first instance, was a proceeding of mandamus brought by the defendants in error, who were relators in the State Court, to compel the Board of Liquidation to sell a sufficient quantity of Consti-

tutional Bonds of the City of New Orleans, which had been made and executed under the provisions of Act 110 of 1890 and the Constitutional Amendment thereby proposed and adopted in 1892, to pay their school certificates, which were not assumed by the City of New Orleans and did not become debts of that City until July 26, 1898. Trans. pp. 1–19.

This claim of relators was made under the following articles of the Louisiana Constitution of 1898:

"ART. 315. The City of New Orleans is hereby authorized and required to examine into and assume payment of the obligations of the Board of Directors of the Public Schools of the Parish of Orleans for unpaid salaries of school teachers and portresses and of other legitimate claims against said School Board, for the years 1882, 1883, and 1884, and for unpaid salaries of school teachers and portresses for the years 1885, 1886 and 1887, now in the hands of the original owners, who have in nowise parted with their rights of ownership, or pledged the same, as may be found by said city to be equitably due by said Board. All claims to be examined into and assumed by the City of New Orleans under this article shall be presented to and filed with the City Council of said city within ninety days after the adoption of this Constitution, and not thereafter.

"ART. 316. The City Council shall issue certificates of indebtedness to the owners of said claims, when examined and found to be equitably due, and all such certificates shall be paid by the Board of Liquidation. If any of the claims aforesaid be rejected by the said City Council, the decision thereon may be reviewed by any court of competent jurisdiction, and the judgment of the court thereon shall, if in favor of the claimant, be likewise paid by the Board of Liquidation.

"ART. 317. The funds requisite to pay said claims shall be provided by said Board of Liquidation, by the sale of a sufficient number of the Constitutional bonds of the City of New Orleans of the issue provided for by Act No. 110 of the General Assembly for the year 1890, and by the amend-

ment to the Constitution of the State submitted to the people by said act and adopted at the general election in 1892."

The amount thus claimed by relators and which they desired to take from the fund was $115,558.33.

The defendant in the original proceeding for mandamus was the Board of Liquidation of the City Debt created by the Act of 1880, and the answer of that Board is found at pages 25 to 41 of the Transcript.

The Drainage Commission of New Orleans, a body politic created by the General Assembly of Louisiana by Act No. 114 of 1896, and which act was amended by the Statute No. 63 of 1898, deemed it its duty to intervene in the cause and to join in the defense. Its petition of intervention is found at pages 19 to 25 of the Transcript. There is practically no dispute as to the correctness of the facts set forth in this petition of intervention. It recites the preparation of a plan of surface drainage by the City of New Orleans and its adoption by the City in July, 1895, and a printed pamphlet containing the plan and maps is annexed to the petition, and brought up with the Transcript and filed in this Court, but has not been printed on account of the great expense which would be involved in engraving the numerous and elaborate maps. See stipulations printed at pages 192 and 193 of the Transcript. This plan was adopted by the General Assembly of Louisiana by Act No. 114 of 1896, referred to above, and was turned over by that statute to the Drainage Commission to be executed with such modifications as the circumstances might require. Intervenor further shows that by the legislation of 1896 and 1898, cited above, that portion of the funds in the hands of

the Board of Liquidation under the provisions of Act No. 110 of the General Assembly of Louisiana of 1890, accruing to public works, that is to say, to permanent public improvements in New Orleans, was, and is, dedicated and applied for the purpose of the drainage of the City of New Orleans, under the provisions and for the purposes of the Act of 1896, together with certain other funds; and that, in order to raise means for the purpose of doing this important work speedily and on an extensive scale, the Drainage Commission was endowed with power to issue and sell its negotiable bonds; and it was provided that all monies and funds dedicated and applied as aforesaid to the purposes of drainage were, and are, consecrated to the payment of the principal and interest of said bonds; and by Section 7 of the Act of 1896, it was further declared that all the provisions of said Act respecting the dedication and application of funds and money should constitute a contract with the holder or holders of bonds issued as aforesaid, the obligation of which contract should not be impaired and should be enforcible by any holder of said bonds by proceedings of mandamus and injunction or by other proper proceedings in court. The intervenor further sets forth the Amendatory Act No. 63 of 1898, limiting the issue of bonds to $1,500,000, and again declaring that all monies and funds so dedicated and applied to purposes of drainage were primarily consecrated to the payment of interest on said bonds and the redemption of the principal thereof, and that all of the provisions respecting the dedication and application of funds and monies should constitute a contract primarily with the holder or holders of the bonds and

also with each and every person or corporation that might have entered into contracts with the said Commission; and the obligation of said contract as to dedication and application of funds and money should not be impaired and might be enforced by any holder of said bonds or by any contract creditor of said Commission by proceedings of mandamus and injunction or by other proper proceedings in court.

The intervention further shows that in proceedings brought by the State of Louisiana against the persons composing the said Drainage Commission, and decided by the Supreme Court of Louisiana June 24, 1897, the Act of 1896 was declared to be a valid act of legislation, and the contracts set forth in the intervention were entered into in view of said decision.

The intervention further shows that existing contracts were made on the faith of the drainage legislation of 1896, and the dedication and consecration of funds thereby, with the National Contracting Co. August 9, 1897, for an amount of work estimated at $1,768,428; with E. A. Grasser, January 18, 1897, $46,170.70; Tulane University, December 7, 1897, $2500; F. B. Camors, April 22, 1898, $10,054.67; and J. J. Keegan, April 2, 1898, $7341.98, being a total of $1,834,-465.35. The amount outstanding and yet to be paid on said contracts at the time the Constitution of 1898 went into effect, namely, on the 12th day of May, 1898, was $1,516,913.30. At the time the intervention was filed, November 15, 1898, the amount thus outstanding had been reduced to $1,037,102.29, which the intervention declares cannot be met if the dedicated funds are reduced or impaired in anywise.

The intervenor further shows that when the said contracts were so made at the dates above mentioned, and especially when the very large one was made with the National Contracting Co., it was well understood that the funds so dedicated by the Drainage Act would not be sufficient to pay for the work done under these contracts as fast as the payments would fall due, but that bonds provided by the Sixth Section of the Act of 1896 would be issued and sold for the purpose; and that, accordingly, the intervenor had advertised and sold to the highest bidder, and for sums considerably above par, its negotiable bonds made in accordance with the Act of 1896 to the amount of $500,000, dated November 1, 1897, having forty years to run, and bearing interest at the rate of 5% per annum, payable semi-annually, and that said bonds were outstanding in the hands of *bona fide* purchasers, and that it would be necessary in like manner to sell the remaining one million dollars of bonds.

Intervenor averred that all of the funds dedicated and consecrated by this drainage legislation to the performance of the contracts made by the Commission and to the payment of the principal and interest of the bonds, were absolutely necessary and essential for said purposes, and that if any of the funds coming to intervenor under the Act of 1896 from the operations of the Act 110 of 1890 and from the portion thereby dedicated to permanent public improvements are diverted to any other purpose, such a diversion would be a violation of the provisions of the Act 110 of 1890 and of the Constitutional Amendment proposed thereby and adopted in 1892, and a violation of the Acts 114 of 1896 and 63 of 1898, and an impairment of the obligation

of the contracts made and established by the Act 110 of 1890 and by the Constitutional Amendments of 1892, and an impairment of the obligation of the contracts entered into by the intervenor with the said contractors, and especially with the National Contracting Company, and an impairment of the obligation of the contracts evidenced by the bonds issued and sold by intervenors for the purpose of carrying out the contracts above mentioned and to be issued and sold.

The intervenor further shows that its contracts, as above set forth, were made and entered into, and its bonds prepared and provided, before the adoption of the Constitution of 1898, to-wit., before May 12, 1898; that the alleged assumption by the City of New Orleans of the claims of relators was not made until on and after July 26, 1898, and long after the said contracts of the intervenor had been entered into, and after arrangements had been made for the issue of said bonds, and after $500,000 of the bonds had been advertised, sold and issued as aforesaid, as will appear by the ordinances referred to and relied upon by the relators. (See the Ordinance of Assumption, Trans. p. 59). The intervenor further alleges that the Articles 315, 316 and 317 of the Constitution of Louisiana of 1898 and any other provisions of said instrument upon the same subject matter, as sought to be applied by relators in this proceeding, and for the purpose of obtaining the relief claimed by them herein, are illegal, null, void and unconstitutional, because:

1. They violate the enabling Act No. 52 of 1896, approved July 7, 1896, of the Legislature of Louisiana, whereby the convention that framed the Constitution of 1898, which was to be adopted without submission to the people,

was strictly limited in its powers, and was prohibited from enacting or ordaining or framing any article or ordinance on the subjects so withheld from its competence, especially any article or ordinance whereby the bonded indebtedness of any parochial, municipal, levee, or other political corporation of the State of Louisiana should be affected, impaired or scaled, or the principal or interest thereof limited, reduced, suspended or abolished, without the consent of the holders of such bonds or security, which consent has never been given by any holder.

2. They violate Section 10 of Article 1 of the Constitution of the United States, whereby the State of Louisiana is forbidden to pass any law impairing obligations of contracts.

3. They violate the provisions of Article 14 of the amendments of the Constitution of the United States, which prohibit any State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or depriving any person of property without due process of law.

4. They violate the provisions of and impair the obligations of the contracts established under the enactments of said Act No. 110 of 1890, and the constitutional amendment submitted thereby and adopted in 1892:

(*a*) By the issue and sale of bonds for purposes not provided, but inhibited, by said act and amendment.

(*b*) By impairing and infringing upon the surplus of proceeds from the tax so provided for permanent public improvement by said act and amendment, and so, as aforesaid, consecrated and dedicated to drainage by the said Act of 1896.

(*c*) By impairing the obligation of the contracts made

under said Act of 1890, and amendment of 1892, and especially provided for in Section 16 of said Act of 1890.

5. They impair the obligations of the contracts made, as aforesaid, by this intervenor and the contract obligations in favor of the holders of bonds issued and sold by intervenor under the said Drainage Act of 1896 and its amendments, as aforesaid, and bonds still to be issued, which depend for their fulfilment and solution upon said funds dedicated, as aforesaid, by the Act of 1896 and amendments, and cannot be met unless said funds remain unimpaired.

The intervenor further sets up its legal right and duty to come into the cause and to protect the funds, and the contracts made and bonds issued by it, and it specially claims the rights and immunities set up under the Constitution of the United States and prays that the demand of the relators might be rejected.

We may refer also to the answer of the Board of Liquidation and the exhibits found at pages 25 to 41.

The testimony in the cause is found at pages 42 to 87 of the transcript. It fully establishes the facts alleged in the intervention.

On December 16, 1898, the Judge of the court of first instance rendered a judgment in favor of the relators, granting their demand and dismissing the intervention of the Drainage Commission, upon the ground that it had no interest in the cause. Pages 88 and 89.

The Board of Liquidation and the Drainage Commission both appealed to the Supreme Court of Louisiana.

The Drainage Commission filed an Assignment of Errors in the Supreme Court of Louisiana under the permissive articles of our Code of Practice, in which the federal ques-

tions were again raised. (Pp. 93-94). On the first of May, 1899, the case having been argued, the Supreme Court of Louisiana rendered its opinion and judgment through its Chief Justice, affirming the judgment of the lower court *in toto*, except as to the question of the rate of interest. (Pp. 95-115).

The Board of Liquidation and the intervenor filed petitions for rehearing under the provisions of the Louisiana Code of Practice, and the Court made two corrections in its judgment which are found at page 124. It maintained the right of the Drainage Commission to intervene and, therefore, reversed the lower court on that point. It also rejected the claim of relators for interest; but in other respects it decided to let its judgment remain undisturbed, and so affirmed all other rulings below. See last judgment, page 125.

Thereupon, the Board of Liquidation and the intervenor each sued out its writ of error to remove the cause to this Court, and the intervenor filed the following assignment of errors (pp. 143-146):

ASSIGNMENT OF ERRORS.

The Drainage Commission of New Orleans, intervenor in this cause, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers are contained in the decision, judgment or decree of the Supreme Court of the State of Louisiana:

First. That by Section 1 of the amendment to the Constitution of the State of Louisiana, proposed by Act 110 of the General Assembly of said State, which proposal was approved July 8th, 1890, and which said amendment was adopted by a majority vote of the qualified electors of said

State at the general election thereon, held in April, 1892, it is provided that the 4 per cent. constitutional bonds of the City of New Orleans thereby authorized shall be for the purpose of retiring the then valid outstanding bonds of the City of New Orleans, and to retire judgments then or thereafter rendered against the said City on floating-debt claims prior to 1879, entitled to be funded under Act 67 of the General Assembly of the State of Louisiana of 1884; that by Section 3 of Act 36 of the General Assembly of 1890, otherwise known as Act 110 of that year, it was provided that all funds received by The Board of Liquidation of the City Debt, defendant herein, shall be deposited with the fiscal agent of the City of New Orleans, or, if the same be deemed not satisfactory by the said board, with a chartered depository selected by the same to the credit of a special fund called the "bond-sales" fund, which fund by said section, it is declared, shall be used solely and exclusively for the purpose of retiring by payment all of the then valid outstanding bonds of the City of New Orleans matured or subject to call, and the payment of judgments then or thereafter rendered on floating-debt claims prior to 1879 entitled to be funded under Act 67 of 1884.

That the purpose for which the said bonds were authorized by said amendment are exclusive of all others, and there is no authority in law for their issuance for any other purpose or purposes than those named in the said amendment; that by the terms of Section 3 of Act 36 (or 110) of 1890, the proceeds of the sale of any of said 4 per cent. constitutional bonds are set apart and dedicated solely and exclusively to the purposes therein named.

That Article 317 of the Constitution of the State of Lou-

isiana, adopted in 1898, which directs the Board of Liquidation to sell a sufficient number of said constitutional bonds to pay certain obligations of the board of school directors of the public schools for the Parish of Orleans for unpaid salaries of school teachers, portresses, and all other legitimate claims against said school board for the years 1882, 1883, 1884, 1885, 1886 and 1887, under the conditions named in Article 315 of the said Constitution of the State of Louisiana, so far as the same might be assumed by the City of New Orleans, after its examination of said claims, as directed by said article, directs the issuance and sale of said constitutional bonds for purposes not designated by said constitutional amendment and by said Act 36 (or 110) of 1890, by reason of which it is an impairment of the contracts and the rights therefrom arising by the said constitutional amendment and the said act.

That the contracts so violated are those in favor of the holders of all outstanding premium bonds issued by the City of New Orleans; all constitutional bonds issued or to be lawfully issued under the authority of said amendment and the said Act; those of all contractors who, up to the time the said Constitution of 1898 went into effect, to-wit., May 12, 1898, had constructed work of permanent public improvement, under contracts with the City of New Orleans, payable out of the surplus of the one per cent. tax authorized by the said amendment and the said Act, which said surplus was established and fully described in Sections 8 and 10 of said Act, and especially all contracts made by the Drainage Commission for drainage works, and all bonds issued by it under the Acts of the General Assembly of the State of Louisiana No. 114 of 1896 and No. 63 of 1898,

which by the last mentioned acts are payable out of the "permanent public improvement fund," composed of one-half of the said surplus of the said one per cent. tax established and described by Sections 8 and 10 of the said Act No. 36 (or 110) of 1890; which said fund, by said Acts No. 114 of 1896 and No. 63 of 1898, is especially set apart and dedicated for the payment and discharge of all said contracts made and of all said bonds issued by the said Drainage Commission.

That said acts further provide that all provisions respecting the dedication and application of funds or moneys shall constitute a contract with the holder or holders of said bonds and with each and every person or corporation which may have entered into contract with the said Drainage Commission, and expressly forbids any impairment of the same.

That the judgment or decree of the Supreme Court of the State of Louisiana which directs the execution of the board of liquidation of said Article 317 of the Constitution of the State of Louisiana of 1898, by the sale of a sufficient number of said four per cent. constitutional bonds to pay and retire the obligations of the board of school directors for the Parish of Orleans, which have been approved and assumed by the City of New Orleans under Article 315 of said Constitution, impairs the obligations of the contracts created by said Acts No. 36 (or 110) of 1890, No. 114 of 1896, and No. 63 of 1898, and that the said Article No. 317 of the said Constitution of itself, as well as interpreted by the Supreme Court of the State of Louisiana, and as the said Court, by its final judgment or decree herein, has directed its enforcement, and such enforcement is an impairment of the obligations of said contracts, and deprives all persons

holding rights under the same of their property without due process of law, all in violation of Section 10 of Article 1 and the Fourteenth Amendment of the Constitution of the United States.

Second. That all persons who made contracts with the Drainage Commission of New Orleans, and executed the same for the construction of works of permanent public improvement, the prices of which are payable out of the surplus of the one per cent. tax authorized by the said constitutional amendment, and levied by said Act No. 36 (or 110) of 1890, one-half of which surplus by Sections 8 and 10 of said act being specially dedicated to the payment and discharge of said contracts, are entitled to exclude from participation in any portion of said one per cent. tax any and all persons not entitled to participate therein by the said constitutional amendment and the said act, since any addition to the burden on said tax imposed by said amendment and said act, will correspondingly diminish the surplus remaining after payment of the annual charges fixed thereon by said amendment and the said act, and thus impair the obligations of the said contracts; that said Article 317 of the Constitution of the State of Louisiana of 1898, and the effect given to it by the final judgment or decree of the Supreme Court of the State of Louisiana in this case, is to impair the said contracts.

Third. That the obligations of all contracts made by the Drainage Commission, and all bonds issued by it and sold under the aforesaid Acts of 1896 and 1898, which are payable out of the permanent public improvement fund, composed of one-half of the surplus described in this assignment, are in like manner impaired by said Article 317 of

the State Constitution of 1898, and the effect given to it by the final judgment or decree in this case, the impairment of such obligations being the same in all particulars as that set up in this assignment, as concerns all contracts for permanent public improvements made with the City of New Orleans, and payable out of the surplus of the said one per cent. tax established and described in Sections 8 and 10 of said Act No. 36 (or 110) of 1890, the addition of the charge for principal and interest on the constitutional bonds, which are directed to be sold by said Article 317 of the Constitution of the State of Louisiana of 1898, affecting a diminution of the said surplus out of which it is the sole and exclusive right of contractors, with the said Drainage Commission and the holders of its bonds, to be paid.

That said Article 317 of said Constitution and the effect given to it by the final judgment or decree of the Supreme Court of the State of Louisiana in this case is an impairment of the obligations of the contracts of said contractors and the holders of said bonds of the said Drainage Commission.

That said Article 317 of the Constitution of the State of Louisiana of 1898, and the effect given to it by the final judgment or decree of the Supreme Court of the State of Louisiana in this case is to impair the contracts in favor of all holders of said constitutional bonds created and evidenced by the said constitutional amendment and the said acts.

Fourth. That said Article 317 of the Constitution of the State of Louisiana of 1898 and the effect given to it by the final judgment or decree of the Supreme Court of the State of Louisiana in this cause impairs the obligation of

all the contracts and bonds heretofore set out, mentioned and described, and deprives the holders and owners thereof of their property without due process of law; in violation of Section 10, Article 1, and the Fourteenth Amendment of the Constitution of the United States.

Fifth. The Supreme Court of the State of Louisiana erred in giving such effect or any effect at all to said Article 317; and it further erred in not rejecting the demand of the relators and dismissing their suit on these grounds; that the errors in the said final judgment and decree and the proceedings anterior thereto are those specially set out and enumerated above, and they entitled defendant to a reversal of said final judgment or decree of the Supreme Court of the State of Louisiana, and the rejection by this Court of the relators' demand.

Wherefore, for these and other errors apparent on the face of the record, this intervenor and plaintiff in error prays that the judgment of the said Supreme Court of the State of Louisiana be reversed, and such directions be given that full force and efficacy may inure to intervenor by reason of the premises set up in its intervention filed in the said cause.

ARGUMENT.

Under the constitutional amendment proposed in Louisiana by the Act 110 of 1890, and adopted in 1892, an issue of constitutional bonds of the City of New Orleans, not exceeding $10,000,000, was authorized for certain specific purposes and for no other. These purposes are specified in Section 1 of the Act. They are:

"For the purpose of retiring the *now existing* valid outstanding bonds of the City of New Orleans, including the bond certificates or bonds issued under the Act of the Legislature, No. 58 of 1882, and to retire judgments hereafter rendered against the city on floating debts *prior to 1879*, entitled to be funded under Act 67 of 1884."

The application of these bonds is described as follows:

"The said bonds shall be applied by the said Board to the retirement of the said outstanding bonds and judgments by the sale of said constitutional bonds and application of the proceeds of sale by the Board of Liquidation to pay or purchase said outstanding bonds and judgments, or by exchanging the said constitutional bonds, for bonds, on the terms and in the mode prescribed by the Legislature."

To provide for the carrying out of this plan, it is further declared that:

"For the payment of the interest and principal at maturity of said constitutional bonds and other outstanding bonds not retired under this amendment, and for the payment of the annual allotments and premiums of the premium bonds of said City, the said City is hereby authorized and directed to levy annually, and until the full payment of said bonds, a special tax of 1 per cent. on all the real and personal property of the City."

The proceeds of said tax to be applied by the Board of Liquidation:

"To the payment of the interest and principal at maturity of said constitutional bonds and outstanding bonds not retired, and to the payment of the allotments of premium bonds and premiums extant in the hands of holders."

It is further provided as follows:

"Said tax is hereby declared to be the contract right of the holder of all of said bonds, and the exemption of said constitutional bonds from all taxation by the City of New Orleans and State of Louisiana is hereby recognized and declared; and after the payment of all the annual interest

on said constitutional bonds and bonds not retired and the payment of the said annual allotments of premium bonds and premiums extant in the hand of holders, and after making provisions for a sinking fund, at such time and of such an amount as the Legislature prescribes, the surplus of said one per cent. shall be disposed of as prescribed by the Legislature."

It is further declared that:

"The Act passed at the present session, No. 36, entitled, An Act to carry into effect the Constitutional Amendment passed at the present session relative to the bond debt of the City of New Orleans, etc., be, and is hereby, approved and confirmed in all its parts as a contract between the City of New Orleans and the holders of the aforesaid constitutional bonds, premium bonds, and of the bonds outstanding not retired, as aforesaid."

This Act called "No. 36," which was probably its journal number, is appended to the constitutional amendment at the foot of page 145 of the Acts of 1890.

Section 2 of the constitutional amendment thus proposed and afterwards adopted, authorizes and empowers the City of New Orleans to examine into and assume the payment of the claims or obligations of the Board of School Directors for the City and Parish of New Orleans due for the years 1880, 1881, 1882, 1883 and 1884. This provision emphasizes the plain distinction between an obligation of the Board of School Directors and an obligation or debt of the City of New Orleans, a distinction which also has been recognized by the Supreme Court of Louisiana; and this Section 2 does not at all authorize the use of the constitutional bonds to pay any obligation of the Board of School Directors, whether assumed by the City or not. On the contrary, the affirmations of this section are pregnant with

a denial of the rights to use the bonds in such a way, it being manifest that claims or obligations of the Board of School Directors are to be assumed and paid in some other way, and as a matter of fact this has been done, as shown in this record. See admissions of counsel, p. 82.

Proceeding now to the act appended to the constitutional amendment, we find in Section 1, page 146, another and equivalent statement and limitation of the use to be made of the constitutional bonds as follows:

"That in order to provide for the retirement of the outstanding bond indebtedness of the City of New Orleans and such other indebtedness as, under *existing* laws, is, or becomes entitled, to be funded into any series of bonds, always saving and excepting, however, the bonds known as premium bonds, the City of New Orleans is authorized, empowered, and directed to issue bonds to the amount of $10,000,000; 9000 of which bonds shall be for $1000, and 2000 of which shall be for $500 each, to be known as the constitutional bonds of the City of New Orleans, dated July 1, 1892, payable fifty years after date, with the right to call by lot," etc.

It is manifest from this provision that it does not enlarge the limitations of Section 1 of the constitutional amendment itself as to the objects to which the bonds were to be solely devoted. On the contrary, the issue is to be confined to the retirement of outstanding bond indebtedness and other indebtedness fundable in bonds under existing laws; that is to say, the bonds outstanding or indebtedness entitled to be funded in bonds prior to July, 1890. Passing on, we find Sections 8, 10 and 16 of the appended act, called 36, to be as follows:

"SECTION 8. Be it further enacted, etc., That out of the proceeds of said one per cent. per annum tax, beginning in the year 1892, the said Board of Liquidation shall annually

provide for the carrying of the premium bond plan, the payment of the interest on the bonds herein authorized to be issued, and of the interest upon all other outstanding interest-bearing bonds of the City of New Orleans, and after the year 1925, for the annual sinking fund necessary to call and retire the number of bonds provided for in Section 9 of this act. After making, in each year, the provisions above required, and after deducting the expenses incurred by said board, and after paying any deficiency in the interest fund of any previous years, one-half of the surplus of said tax shall be passed to the credit of a special fund, to be known as the 'permanent public improvement fund,' to be disposed of as hereinafter provided; the other half of said surplus shall be paid over to the School Board of the City of New Orleans, in addition to any fund appropriated by said city out of other funds, to be used in the maintenance and support of the public schools in said city."

"SECTION 10. That the permanent public improvement fund, above provided for, shall be used exclusively for the construction of permanent public improvements in the City of New Orleans, such as levees, canals, drainage stations, pavements, public buildings, public parks and bridges, and all ordinances passed by the City Council to be paid out of this fund, shall first be approved by the said Board of Liquidation, who shall not draw any check on said fund unless they are convinced, upon proper inquiry, that said ordinance covers the construction of a permanent public improvement, within the purview of this act. The true intent and meaning of this clause is not to give said Board any authority to say to what permanent public improvement any fund shall be applied, but only to see that said funds shall be applied exclusively to the construction of improvements that are permanent."

"SECTION 16. That all of the substantial provisions of this act are hereby declared to be a contract between the State of Louisiana, the City of New Orleans, the taxpayers of said City, and each and every holder of said constitutional bonds."

By the concluding portion of Article 254 of the Consti-

tution of 1898, it is provided that one-half of this surplus which goes to the public schools shall not be disturbed, but that the schools shall still continue to receive the same. If, therefore, the relators succeed in carrying out their plans in this case, the disturbance of the surplus will fall entirely upon the one-half which has been consecrated as a permanent public improvement fund, and which will thus be reduced to a double degree.

We now come to the relation of the DRAINAGE COMMISSION OF NEW ORLEANS to this cause. Referring again to Act 114 of 1896, we find that by the 3d Section of that law, the portion of the funds in the hands of the Board of Liquidation under the provisions of Sections 8 and 10 of the Act No. 110 of 1890, devoted to permanent public improvements, accruing to such works from and after Jan. 1, 1898, is dedicated and applied to the purpose of drainage of the City of New Orleans, being one of the principal purposes catalogued in Section 10 of the Act of 1890, as quoted above.

By Section 4 the Commission is endowed with full power to control and execute the drainage of the City of New Orleans, and to carry out substantially the plan for such drainage which had been adopted by the Council of said City July 10, 1895.

By the 6th Section, in order to do the work of drainage speedily and on an extensive scale, so as to benefit all parts of the city as soon as possible, the Commission is authorized to issue bonds to an amount not exceeding $5,000,000, and all moneys and funds dedicated and applied by the act to the purpose thereof are consecrated to the payment of the principal and interest on said bonds.

By Section 7 all the provisions of the act respecting the dedication and application of the funds and moneys are constituted a contract with the holder or holders of the bonds.

On June 21, 1897, in the case of the State vs. Flower, 49th Annual, 1199, the Supreme Court of Louisiana decided that the Drainage Commission was a lawful body, which the Legislature had the power to create as an instrumentality for the drainage of the city, and on the faith of this decision contracts were made and bonds issued, as hereinafter set forth. P. 82.

After this decision had been rendered and from about August, 1897, down to a time just prior to the adoption of the Constitution of 1898—that is to say, May 12, 1898—on the faith of the Act 114 of 1896 and the above decision of this Court, the Drainage Commission entered into contracts to the amount of nearly $2,000,000, which are all set forth in the testimony and concerning which there is no dispute, and of the work so contracted for a very large amount remained still to be done and paid for, which, as the testimony shows, must be paid for in cash from time to time as the instalments are completed. The testimony also shows that no proceeds had as yet been received by the Drainage Commission from the permanent public improvement fund under Act 110 of 1890, but a certain amount was expected to be received during the year 1899. In order to speed the construction of the work, bonds were prepared and provided under Act 114 of 1896, bearing date November 1, 1897, and of these $500,000 were sold at a premium to *bona fide* purchasers in June, 1898. By Act No. 63, approved July 9, 1898, the issue of bonds was limited to $1,500,000,

and it was declared that all moneys and funds dedicated and applied for the purposes of drainage by the Act 114 of 1896, as amended by Act 63, were primarily consecrated to the payment of the interest on said bonds and the redemption of the principal, and that all of the provisions respecting the dedication and application of funds and moneys should constitute a contract, primarily, with the holder or holders of said bonds, and also with each and every person or corporation that might have entered into contracts with the said Commission, and the obligation of said contract should not be impaired.

It appears without dispute that in 1897, when the bulk of the contracts were made, it was understood that drainage bonds would be thus issued and sold to meet the contracts. (See testimony of Walmsley, p. 47; Mullan, p. 73, and Freret, p. 73).

We call especial attention to the foregoing dates, from which it will be seen that the contracts made by the Commission antedate the adoption of the Constitution of 1898; that when they were made it was understood that drainage bonds would be issued and sold to pay for the work; that the bonds were prepared and dated November 1, 1897, and that the assumption by the City of New Orleans of the obligations of the School Board, upon which this suit is instituted, did not take place until July 26, 1898; that is to say, long after our contracts were made and bonds issued and sold, and after the amending Act of July 9, 1898, had been adopted by the Legislature. Prior to July 26, 1898, the City of New Orleans owed relators nothing. Labatt vs. City, 38 La. An. 283. Trans. p. 106.

It cannot be disputed, as a matter of fact, that all the

funds consecrated by the Drainage Act, 114 of 1896, are absolutely necessary to meet the contracts made, as above stated, and the principal and interest of bonds already issued. The testimony of Mr. Walmsley on this point is clear and uncontradicted, pp. 48-50. It further appears, as a matter of fact, that if the demands of the relators are allowed, $115,000 of bonds will be issued under Act 110 of 1890, on which the annual interest charge will be $4,600. The surplus coming, therefore, to the permanent public improvement fund and dedicated to drainage purposes would be reduced by at least the sum of $2,300 a year for not less than forty years. But inasmuch as under the operations of Article 254 of the Constitution of 1898, quoted above, the half of the surplus going to schools is specially protected, the whole of this impairment of $4,600 a year will fall upon the half of the surplus coming to the Drainage Commission. It will be seen at once, as a matter of mathematics, that this impairment might amount to $170,000 or more, and this in addition to the claims of a sinking fund.

I.

As appears from the foregoing statements founded upon the record, the Supreme Court of Louisiana, reversing the court of first instance, in this respect, has finally decided that the Drainage Commission had the right to intervene for protection of the fund committed to it and of the various contracts which it had made. The legal status of the Drainage Commission and its right so to intervene are questions arising under the Constitution and laws of Louisiana, and the decision of the Supreme Court of Louisiana upon such local questions is final. And as to the general

right to intervene, we may refer to State vs. Pilsbury, 31 La. An. 1, 8.

The surplus coming to the Drainage Commission from the operation of the Act No. 110 of 1890 belongs to it; and it has the same right to protect the fund that a private person similarly situated might have to protect a fund from illegal seizure or conversion.

The fund is specially dedicated to an important purpose, and large contracts have been made and bonds issued upon the faith of this fund, and it is the duty of the Drainage Commission, in its fiduciary capacity and on plain general principles, to protect this fund from impairment, whether such impairment be great or small. In the case of Florida against Georgia, 17 Howard, 478, Mr. Caleb Cushing gave an excellent definition of intervention, which he saw was derived from the Civil Law, as follows:

"Intervention is the generic designation in the Civil Law of the various technical processes by which, when a suit is pending between two parties, a third party is allowed to interpose for the assertion of some collateral, implicit or ulterior right, adverse to that of either or both of the others, or to defend a responsibility involved in the issue of the controversy."

It was claimed in argument below that the Drainage Act of 1896 is unconstitutional, as a matter of State law, so far as it undertakes to place the permanent public improvement fund under the administration of the Drainage Commission.

But the Supreme Court of Louisiana in this cause held the Drainage Commission entitled to intervene and protect this fund, and manifestly considered the drainage laws constitutional, p. 124. We may refer, also, to State vs.

Flower, 49 Louisiana Annual, 1199. But this being a State question, we need not trouble this Court by discussing it. Cornell vs. Fiske, 136 U. S. 152, 174; In Re Duncan, 139 U. S. 449.

II.

It appears by the testimony and as a matter of calculation that by the execution of Articles 315, 316 and 317 of the Constitution of 1898, as proposed by the relators and by the judgment of the State Court, the surplus coming to the permanent public improvement fund will be impaired by at least $170,000—say, $4,600 a year for some forty years. This impairment is a very serious one, especially as the testimony shows that every cent of the permanent public improvement fund is needed to carry out the contracts made by the Drainage Commission prior to May 12, 1898, and to pay the drainage bonds which were issued and sold before the City assumed the claims of the relators. We repeat that the Drainage Commission had made contracts amounting to nearly $2,000,000; and had issued and sold bonds to pay such contracts to the amount of $500,000 before the City became indebted to relators.

It may be added also that the amount of impairment is not essential. The Constitution of the United States does not declare that a State "shall not pass any law impairing the obligation of contracts to a very great extent." The prohibition is against the impairing of such obligations at all. In Planters' Bank against Sharp, 6th How., page 327, the Court said:

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not

a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In Louisiana against New Orleans, 102 U. S., at page 206, it was said:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."

III.

It results that the Articles 315, 316 and 317, and especially 317, as sought to be enforced in this case, are unconstitutional for the reasons given in the intervention. The means provided to meet the contracts of the Drainage Commission consist of that permanent public improvement fund in a very large measure. There is no dispute as to the fact that every cent is required to carry out this most important work, and to fulfil the obligations of these contracts, which must be paid promptly or the whole plan will fall into a state of chaos. To enforce Article 317, as proposed in this case by the relators, would not only impair obligations issued by the Board of Liquidation, whose rights will be defended by its counsel, but will impair the obligation of the contracts made by the Drainage Commission and the bonds issued by it. These contracts were made prior to the Constitution of 1898, and with the distinct understanding that the bonds prepared and dated November 1, 1897, would be sold to meet them. The contracts were also made and the bonds sold to *bona fide* purchasers prior to the assumption by the City of relators' claim. That assumption was on July 26, 1898, and prior to that

date the City owed the relators nothing. Under Articles 315, 316 and 317 the relators' claims in this case, therefore, date only from July 26, 1898. Articles 315, 316 and 317 are, therefore, invalid:

(*a*) Under the contract clause of the Constitution of the United States, Article 1, Section 10.

(*b*) Under the fourteenth amendment of the United States Constitution, because they undertake, as shown in this case, to deprive a person of property without due process of law. The person to whom we refer is the Drainage Commission of New Orleans, which is a juridical person, and included in the terms of the fourteenth amendment by repeated decisions; it having been held that the fourteenth amendment protects legal persons as well as natural persons. (Santa Clara Co. vs. So. Pac. R. R. Co., 118 U. S. 394).

The regime established by the Articles 315, 316 and 317 seeks to break up and impair the whole plan of the Act 110 of 1890 and the constitutional amendment of 1892, and it ought not to be enforced. The fact that this attempt is made under a State Constitution makes no difference.

Cole vs. La Chambre, 31 La. An. at page 45.

White vs. Hart, 13 Wallace, 646.

IV.

Great reliance has been placed by the relators upon language used in the case of the Board of Liquidation against McComb, 92 U. S., page 531; but rightly considered, the decision in the case of McComb is very much in point in favor of the plaintiff in error in this case. McComb, a citizen of Delaware, filed his bill in the United

States Circuit Court in New Orleans, as a holder of consolidated bonds under the Act No. 3 of 1874, to enjoin the Board of Liquidation appointed under that act, which was about to violate its limitations by issuing bonds for an object beyond its scope. He obtained an injunction in the Circuit Court, and on appeal to the Supreme Court of the United States, the decree was affirmed; thus declaring that even State officers composing a board of liquidation may be enjoined from violating the limitations of the Funding Act of 1874. Such a result seems to us to be in our favor in this controversy. The final result which we seek to obtain is tantamount to that which was attained by McComb.

The following differences may be noted between the two cases:

(*a*) The Board of Liquidation in the case of McComb was willing to illegally fund the debt of the Levee Company.

(*b*) The debt of the Levee Company was in existence prior to the Funding Act of 1874, whereas the City of New Orleans in the case at bar owed the relators nothing on the 12th of May, 1898, under Articles 315, 316 and 317, when the Constitution went in force.

(*c*) There was no question in the McComb case of a surplus resulting from a special tax and dedicated to a public improvement fund, to be administered for purposes quite distinct from the issue of constitutional bonds and by agencies quite distinct. Under the Funding Act No. 3 of 1874, any surplus was used simply to pay the new bonds, and there was no question of the right of a permanent public improvement fund to a surplus which would be greater if the issue of honds was confined to its legitimate

purpose and which would be diminished if the issue of bonds should be unlawfully extended. This is a very important difference and does away with all effect of any expressions in the opinion of Mr. Justice Bradley which have been cited against us in this case. The right to such a surplus and to its preservation was not agitated in the case of McComb at all. If there had been such a surplus, coming to some third person, and devoted to some other object, by the Funding Act of 1874, it cannot be doubted that this Court would have considered the impairment of that surplus as another reason for affirming the decree in favor of McComb.

(*d*) But it may also be specially noted that while Mr. Justice Bradley discussed the question whether McComb could complain of an issue of bonds, provided it did not exceed the limit of $15,000,000, neither he nor the Court reached any real decision of the question. What the learned Judge said was, at page 539, that if this were all the case, the complainant would have "great difficulty" in maintaining his bill. This was not decision. It was not necessary to the disposition of the case, and no decision was really made in regard to it, because it was found that there was another point upon which the decree should be affirmed, and that was that the Board of Liquidation in that case was proceeding in a method not justified by the limitations of the Funding Act of 1874. This is distinctly in our favor.

V.

We come now to a very curious point in the case. In former briefs filed by our opponents, it seems to be intimated that the State Court has done us no harm, because

the Chief Justice of Louisiana, as the organ of the Supreme Court of our State, has, in his reasons, stated a number of propositions in our favor, and seemingly supported our main contentions. It is quite true that the learned Chief Justice, in what the civilians call the "*motifs*" of the opinion delivered by him, and especially in the portions found at pages 110 to 114 of the Transcript, concedes and states that the Drainage Commission has been duly organized, and, at the time of the adoption of the Constitution of 1898, had created obligations to a large amount payable out of the surplus which is here in question. He further states that the relators do not claim a right to have their claims paid under the Act of 1890, and declares that their pretensions rest exclusively upon the effective force of Articles 315, 316 and 317 of the Constitution of 1898, which effective force the defendants question. Page 110. At page 111, while suggesting that the Constitutional Convention might possess the power to stop the work of drainage, he yet declares that the rights of contract creditors as they should have existed at the date of such action by the convention could not have been impaired by such action; in other words, that the Constitutional Convention could have no right to do anything that should impair the obligation of our existing contracts.

He then discusses, pages 111, 112, the question whether the constitutional bonds which the relators demand to have sold in order that the proceeds may be applied to their claims would prime the holders of the bonds issued by the Drainage Commission, or stand on a footing of equality with the other consolidated bonds issued under the Act

110 of 1890, and arrives at the following conclusions, stated in our own language:

1. If, for any cause, the amount of the 1% tax imposed and collected under the Act 110 of 1890 should be insufficient to provide for prior obligations, the holders of the bonds to be issued under this mandamus could not force the former to prorate with them the amount in hand.

2. This condition of things does not yet exist and may never arise, but should it arise, the Board of Liquidation would, doubtless, have taken steps to distinguish bonds issued under Article 317 from those which had been otherwise issued.

3. It sometimes happens from special circumstances that the holders of one or more of the same series of notes may hold rights subordinate to those of the holders of others, and if there should be in the future any actual conflict of interests, the Board of Liquidation and the parties interested will doubtless have taken steps to be able to protect themselves.

4. As to the surplus, the learned organ of the court denies the theories of the relators and adopts the theory of the defendant and intervenor, and then says, p. 113:

"We think the Board of Liquidation, the Drainage Commissioners, and those with whom they contracted, were justified in placing that interpretation upon the legislation, and that contract rights based upon the same should be protected from impairment. The Convention, while ordering the payment of the certificates held by the relators through sales of consolidated bonds, could not confer upon the holders of such bonds rights which in any way would come in competition with the contract rights of creditors existing against the tax at the time of the adoption of the Constitution. Though there was no mention

in the Constitution as to the rank of the bonds which would be issued to take up relators' certificates, that rank resulted from legally existing conditions which could not be constitutionally interfered with. There is no constitutional objection to the convention ordering the Board of Liquidation to sell bonds to take up the relators' certificates, *but there would be constitutional objections to be urged if the effect of the issuing of such bonds would be to place the holders thereof on an equality with the holders of bonds issued to take up the bonds and claims provided for as to their funding and payment by Act No. 110 of 1890, Act No. 114 of 1896 (the drainage act)*, and the Constitutional Amendment of 1892. Duperier vs. Police Jury, 31 An. 710; Shields vs. Pipes, 31 An. 765.

"The consolidated bonds which relators seek to have issued upon their prayer will really be drawn against, when issued, any surplus that will remain of the 1% tax after the payment of all the bonds issued and to be issued by the Board of Liquidation under Act No. 110 of 1890 and the Constitutional Amendment of 1892, in order to fund and retire and pay the bonds and debts therein specially enumerated, *and also the bonds issued and to be issued by the Drainage Commission under the provisions and authority of Act No. 114 of 1896*, to pay the contracts existing at the date of the adoption of the Constitution, which were entered into upon the faith of the surplus directed to be set aside to the credit of the permanent improvement fund by the Act No. 110 of 1890, *Act No. 114 of 1896*, and the Constitutional Amendment of 1892."

These expressions by the learned organ of the Court are certainly greatly in our favor, and if they had been carried into effect by the judgment of the Supreme Court of Louisiana, would have resulted in a very different judgment. It is quite possible that with such an outcome, the Supreme Court of the United States would not have been troubled in the matter. The learned Chief Justice of Louisiana seems to have felt the force of our contentions, and up to the close of his opinion it seemed that the judgment of his

Court would be in our favor, sustaining our federal rights, to at least a considerable extent. But when we come to what the civilians call the "*dispositif*" portion of the opinion, we find a sudden and disastrous change, and the judgment as rendered is as follows (p. 114):

"For the reason assigned, it is hereby ordered, adjudged and decreed that *the judgment of the District Court* be, and the same is hereby, *affirmed*, except as to the interest allowed, which interest is hereby reduced from 5% to 4%, the costs of appeal to be borne by appellees."

The defendant and the intervenor each made an application for a rehearing, which resulted in the following modification of the opinion and of the judgment of the Supreme Court of Louisiana (page 124):

"An examination of this cause on the application for a rehearing has brought to our notice that in affirming the judgment of the District Court we affirmed that portion of the same which dismissed the intervention of the Drainage Commission of New Orleans as being without any interest in the cause.

"A re-examination of the cause has brought us to the conviction that our judgment is erroneous, in so far as it accorded interest to the relators upon their certificates.

"For the reasons assigned, it is ordered, adjudged and decreed that our former judgment be amended by setting aside that portion of the same by which interest at four per cent. is accorded to the relators, and by which the judgment of the District Court is affirmed in dismissing the intervention of the Drainage Commission.

"It is now ordered, adjudged and decreed that the judgment of the District Court, in so far as it dismisses the intervention of the Drainage Commission of New Orleans as having no interest in the cause, and in so far as it recognizes the right of the relators to interest upon their certificates, be annulled, avoided, and reversed, and it is now ordered, adjudged and decreed that, recognizing the right of the

said Drainage Commission to intervene herein, its intervention be, and it is hereby reinstated; and it is further ordered and decreed that that portion of relators' present demand by which they pray that they be recognized as entitled and accorded interest upon their certificates be. and the same is hereby rejected.

"It is further ordered, adjudged and decreed, that the judgment of the District Court, except as herein altered and amended, be affirmed, and our own judgment, except in so far as herein altered and amended, remain undisturbed."

The judgment of the District Court, as thus finally affirmed (pages 88, 89), directs the issue and sale of bonds as demanded by the relators, defendants in error here, without any reservations whatever. It flatly denies every claim in the cause, whether State or Federal, made by the Board of Liquidation and the Drainage Commission. It denies the rights they each claim under two clauses of the Constitution of the United States. It holds the Articles of the Louisiana Constitution of 1898, 315, 316 and 317, to be valid, which we had asserted to be invalid, and in conflict with the contract clause of the Constitution of the United States and the fourteenth amendment.

Leaving aside, then, the corrections made by the final judgment of the Supreme Court of Louisiana as to the status of the Drainage Commission and the question of interest on relators' claims, the net result is the absolute affirmance of the judgment of the District Court denying our Federal rights, and directing an immediate and unqualified issue and sale of consolidated bonds, whose purchasers would at once claim rights equal to those of the holders of any other bonds issued under the same law, and

would at once invoke the well established doctrine to which we shall now refer.

They would at once say: "We have purchased these bonds under a decree of the Civil District Court for the Parish of Orleans, which has been affirmed by a decree of the Supreme Court of Louisiana, and neither decree contains any limitation of our rights or any subordination of our bonds. We invoke the well settled rule of law that the decree must govern."

What answer could be made to such a holder for value? None at all. The jurisprudence of Louisiana on the interpretation and effect of a decree or judgment is perfectly settled. The opinion and reasons leading up to a decree are called motives (*motifs*), and the judgment or decree is characterized as dispositive (*dispositif*). In determining the meaning and effect of a decree or judgment, the dispositive portion controls.

It is the thing adjudged, the "*chose jugée*," the basis of *res adjudicata*. In Keane vs. Fisher, 10 La. Annual, 261, 262, the rule was applied in a case analogous in principle to that at the bar. The lower Judge had predicated his judgment on some distinctions apparently made in a former opinion of the Supreme Court of Louisiana (9 Annual, p. 70). But the Court, in dealing with the surety in the 10 Annual, 262, pointed out that the reasons given in the 9 Annual, the motives, formed no part of the judgment, *which made no change in the judgment of the lower court.* This judgment was affirmed and bound the surety in the case. And the Court cited Marcadé, to whose views we shall hereafter refer.

See, also, Davis vs. Wilcoxen, 10 An. 640.

In Hill vs. Bowman, 14 Louisiana, 445, 446, the Court said, through Chief Judge Martin:

"The original judgment affirmed by us absolutely must have its effect independently of any expression used by this Court in affirming it."

In Plicque vs. Perret, 19 Louisiana, 318, 324, the same rule was followed on a similar question, the Court saying:

"The Court (Supreme Court of Louisiana) proceeded to affirm the judgment of the District Court in all its parts. * * * We are bound to consider the judgment of the District Court as forming that of this tribunal, just as much as if it had been copied into our formal decree affirming that of the court below."

In Slocomb vs. De Lizardi, 21 La. An. 355, 358, where this question was argued by very distinguished counsel, the same rule was followed and the citation from Marcadé adopted, which may be translated as follows:

"It is well understood that it is only in the dispositive portion of a judgment, and not in its motives, that the thing adjudged is found. * * * And more than this, the dispositive portion itself presents the thing adjudged only respecting those points actually decided, and not those merely enounced. It is by examining the questions on which the parties were in controversy, and which their contest presented—*quid judicandum*—that we easily come to understand what has been adjudged—the *quid judicatum*."

Applying these elementary and indisputable rules, we find the court of first instance denying absolutely the federal rights of the plaintiffs in error, and this denial expressly affirmed.

The arguments, the hypotheses, the "enunciations," in the opinion of the Supreme Court of Louisiana, cannot control the effect of what was thus finally decreed. If the

court had ordered a new trial, to be had in conformity with its views as expressed in its *motifs*, the result might have been different. As to this we are not called on to express an opinion as counsel. The court did not order a new trial.

The result is that we have a decree of the District Court affirmed against us, denying our federal rights and asserting the validity of provisions we had claimed to be in conflict with the Federal Constitution. Neither the decree of the District Court as affirmed, nor the decrees affirming it, contain any word recognizing our rights as specially claimed under the two clauses of the Constitution. The lower Judge denied them. His judgment in this regard was affirmed by the Supreme Court of Louisiana. Our writ of error presents two federal rights specially claimed. We oppose the execution of the Articles of the Constitution of Louisiana on the ground that they were invalid, being in conflict with the Constitution of the United States as to the contract clause and the Fourteenth Amendment. Those articles were held valid, and we had a right to our writ.

Another suggestion may show the extraordinary plight in which the defendants in error have been placed by the discrepancy between the *motifs* in the opinion of the Supreme Court of Louisiana and the dispositive portions of its judgment affirming the judgment of the lower court. If we obtain no relief here, the judgment of the Civil District Court for the Parish of Orleans, standing as it does affirmed by the Supreme Court of Louisiana, could be, and would be, enforced by a process of contempt, and in other ways, according to its terms, and without regard to the *motifs* in the opinion of the Chief Justice of Louisiana. The Board of Liquidation would be told :

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(1) That the Act of 1890 and the Amendment of 1892 do not contemplate any issue of bonds inferior to others theretofore emitted under that legislation; and

(2) The judgment of the District Court being affirmed without any reservation in this regard, is affirmed according to its terms, and is not to be modified or impaired by any enunciations or expressions in the opinion of the Supreme Court of Louisiana in favor of our rights.

It seems plain to us that the admission of our rights in the opinion of the Supreme Court of Louisiana and the denial of those rights by its judgment, affirming a denial by the court of first instance, entitle us to relief. If the decrees of the State Court be executed, every right recognized in the opinion of the Supreme Court of Louisiana will be swept away by its decree. There must be some remedy for such an extraordinary condition of things, and the remedy may be found in reversing the judgment of the Supreme Court of Louisiana and making such proper orders as may safeguard our federal rights. And we, therefore, ask that the judgment which has been brought here for review may be reversed, and that such other and further orders and judgment may be made as may be proper in the premises.

WILLIAM WIRT HOWE,
WALKER B. SPENCER,
Of Counsel for Drainage Commission of New Orleans, one of the Plaintiffs in Error.

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No. 119. (& 114)
Appendix to Br. for Drainage

Office Supreme Court U.S.
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JAMES H. McKENNEY

Filed Dec. 4, 1900.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

No. 119 [114].

THE DRAINAGE COMMISSION, Etc., Plaintiff in Error,

versus

STATE EX REL. MISS L. B. WILDER Et Als., Defendants in Error.

APPENDIX TO BRIEF OF PLAINTIFF.

Drainage Acts of 1896 and 1898.

T. H. THOMASON, PRINT, 528 NATCHEZ STREET, N. O.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 119 [114].

THE DRAINAGE COMMISSION, ETC., PLAINTIFF IN ERROR,

versus

STATE EX REL. MISS L. B. WILDER ET ALS., DEFENDANTS IN ERROR.

APPENDIX TO BRIEF OF PLAINTIFF.

Drainage Acts of 1896 and 1898.

ACT No. 114]

AN ACT

To provide for the drainage of the City of New Orleans; to establish the Drainage Commission of New Orleans; to provide ways, means and funds for such drainage; to provide for the issue and payment of bonds and to direct the co-operation of the Board of Commissioners of the Orleans Levee District:

Whereas, due notice under Article 48 of the Constitution has been given of the intention to apply to the Legislature for the passage of this Act:

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That a board is hereby established, to be called the Drainage Commission of New Orleans,

which shall be composed as follows, to-wit: Of the Mayor of New Orleans; the Chairman of the Council Committees of Finance, of Budget, and of Water and Drainage; of the President of the Board of Commissioners of the Orleans Levee District, and two other members of said board, selected by it; of the President of the Board of Liquidation of the City Debt of New Orleans, and one other member of said board, to be selected by it, being nine members in all; and said Commission, by its said name, shall have all the powers and succession of a body politic and corporate.

SEC. 2. Be it further enacted, etc., That said Commission shall organize by selecting one of its members as President and some competent person as Secretary. It shall have power to make by-laws and rules for its own government, and to define the duties of its officers and committees, and to change the same by a vote of two-thirds of its members. It shall hold regular meetings on such days as it may determine, and shall call special meetings, as may be provided for in its by-laws. All meetings of said Commission, or any committee, or special committees it may appoint, shall at all times be open and public, and its books, papers, documents and records shall be public records.

And it is hereby made the duty of the government of the City of New Orleans to provide suitable offices for said Commission, wherein its meetings shall be held and its books, papers, documents and records shall be kept.

SEC. 3. Be it further enacted, etc., That that portion of the funds in the hands of the Board of Liquidation under the provisions of Sections 6 and 10 of Act No. 110 of the General Assembly of Louisiana of 1890, accruing to public

works, etc., from January 1, 1898, is hereby dedicated and applied to the purposes of this act; and all monies and funds now under the control of the City of New Orleans, and hereafter to be received, arising from the sale of street railroad franchises or other franchises, are also hereby dedicated and applied to the purposes of this act.

All monies or funds thus hereby dedicated shall be drawn and expended by said Drainage Commission by checks signed by the president and secretary and countersigned by the mayor.

SEC. 4. Be it further enacted, etc., That said Commission shall have full power to control and execute the drainage of the City of New Orleans, and may proceed to execute and carry out substantially the plan for such drainage, adopted by the Council of said City, by Ordinance 10,091, Council Series, approved July 10, 1895, so far as it may find said plan desirable and practicable, with the right, however, to modify the same as in its judgment circumstances may require.

It shall have power to make rules and regulations for the protection and conservation of all works under its control, both completed and uncompleted, and of all works necessary or incidental thereto, and any violation of the rules and regulations established by the said Commission, and duly promulgated in the Official Journal, shall be punished by a fine not exceeding $25 for each offense, or by thirty days' imprisonment for each offense, or by both, in the discretion of the Recorder.

It shall be the duty of the City of New Orleans, at the request of said Commission, to transfer to the custody and control of the said Commission so much of the

existing drainage plant or plants of the City of New Orleans as the said Commission may deem necessary for their purposes; provided, however, that the said City of New Orleans shall always, out of her general budget, provide the necessary funds to run all drainage machines now in existence or that may hereafter be established by the Commission, the true intent and meaning of this act being that the funds of the Commission shall be applied only to the construction of permanent public works, and no part thereof shall be applied to the operation of said works.

Nothing in this section shall be construed as compelling the Commission to take charge of any of the present existing systems unless in their judgment it may be advisable to do so.

SEC. 5. Be it further enacted, etc., That all work done, or supplies and materials ordered, by said Commission, of every kind and nature, except emergency work in times of extreme peril from storm or flood, shall be let by contract to the lowest responsible bidder, by sealed proposals, or by public auction, as the Commission may determine, after at least thirty days' advertisement in two newspapers in the City of New Orleans, on approved specifications, one of which specifications shall always be that the contractor shall give bond, with security satisfactory to the Commission in at least one-fifth of the amount of his bid for the faithful performance of his contract; and in case the work estimated by the said specifications shall exceed the sum of fifty thousand dollars, bids for the same shall be similarly advertised in New York and Chicago, as well as in the City of New Orleans.

In all cases the right shall be reserved by the Commission to reject any and all bids.

SEC. 6. Be it further enacted, etc., That the works performed by said Commission shall, so far as possible, be done in such manner as to benefit all parts of the city without discrimination as to locality, and in order to raise funds for the purpose of doing such work speedily and on an extensive scale, said Drainage Commission of New Orleans shall have power to issue and dispose of its negotiable bonds to an amount not exceeding five millions of dollars in denominations of $20, $50, $100, $500 and $1000, bearing interest at a rate not exceeding five per centum per annum, payable semi-annually, to be sold by said Commission at not less than par. Said bonds shall have forty years to run, and shall, when issued and not before, be executed by the president and attested by the secretary, under the seal of the Commission, shall be payable to bearer and shall have semi-annual interest coupons attached bearing the engraved signature of the president. All monies and funds dedicated and applied by this act to the purposes thereof are consecrated to the payment of the principal and interest on said bonds, and the Commission, after the year 1920, shall have the right to call in by lot not exceeding two hundred thousand dollars of said bonds in July of each year. The numbers of the bonds so drawn by lot, together with notice that such bonds will be paid on the ensuing first of January and that interest thereon will then cease, shall be published in a New Orleans newspaper for thirty days.

SEC. 7. Be it further enacted, etc., That all the provisions of this act respecting the dedication and application

of funds and money shall constitute a contract with the holder or holders of bonds issued as aforesaid, the obligation of which contract shall not be impaired and may be enforced by any holder of said bonds by proceedings of mandamus and injunction or by other proper proceedings in court.

SEC. 8. Be it further enacted, etc., That said Commission shall have power to employ such engineers, and counsel as it may find necessary in the progress and execution of its work; and shall have the power to expropriate property according to existing laws, by legal proceedings in its name and the right in all streets, and in and over all lands of the State and city in New Orleans or in the parish of St. Bernard, is hereby granted to said Commission for any of its works.

SEC. 9. Be it further enacted, etc., That it shall be the right and duty of the Board of Commissioners of the Orleans Levee District, in the exercise of its obligations under Act 79 of 1892, to co-operate with the Drainage Commission in executing the plans of said Commission, and in order to make such co-operation more effective the said Board of Commissioners of the Orleans Levee District shall have the power and authority to continue the levy of the tax of one mill on the dollar, provided for in Section 5 of Act 93 of 1890, until the completion of the levee and drainage systems of the City of New Orleans.

SEC. 10. Be it further enacted, etc., That the said Commission shall, semi-annually, beginning on the first day of January, 1897, make to the common council of the City of New Orleans a full and detailed report of all sums received and sums expended, the purposes for which ex-

pended, and a statement of the progress and character of the work contracted for and performed during the previous six months; and the said Commission shall, from time to time, if so required by the council, present special reports as they may be demanded.

SEC. 11. Be it further enacted, etc., That no member of the said Commission shall receive any compensation whatever for his services as a commissioner, except traveling expenses incurred in behalf of the Commission.

SEC. 12. Be it further enacted, etc., That no member of said Commission shall ever be interested in any contract or in the profits of any contract made by said Commission, nor for six months after the termination of his connection with the Commission, under the penalty of the absolute nullity of said contract, nor shall any member of said Commission ever be surety for any contractor or officer of the Commission.

SEC. 13. Be it further enacted, etc., That all laws and parts of laws in conflict with this act are repealed, and this act shall be liberally construed to effect its object.

Approved July 9th, 1896.

ACT No. 63]

AN ACT

To amend and re-enact Sections 6, 7 and 8, of Act No. 114 of 1896, entitled "An Act to provide for the drainage of the City of New Orleans; to provide ways, means and funds for such drainage; to provide for the issue of bonds, and to direct the co-operation of the Board of Commissioners of the Orleans Levee District;" and to provide for flushing in connection with such drainage.

Whereas, due notice under Article 50 of the Constitu-

tion has been given of the intention to apply to the General Assembly for the passage of this Act:

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, that Sections 6, 7 and 8, of Act No. 114 of 1896, approved July 9th, 1896, be and the same are hereby amended and re-enacted so as to read as follows:

SEC. 6. Be it further enacted, etc., That the works performed by said Commission shall, so far as possible, be done in such manner as to benefit all parts of the City without discrimination as to locality, and in order to raise funds for the purpose of doing such work speedily and on an extensive scale, said Drainage Commission of New Orleans shall have the power to issue and dispose of its negotiable bonds to an amount not exceeding one million five hundred thousand dollars, in denominations of $1000 each, bearing interest at the rate of five per centum per annum, payable semi-annually, to be sold by said Commission at not less than par. Said bonds shall have forty years to run from November 1, 1897, and shall when issued, and not before, be executed by the President and attested by the Secretary under the seal of the Commission; shall be payable to bearer, and shall have semi-annual interest coupons attached bearing the engraved signature of the President. Such bonds may also be registered under such regulations as said Commission may prescribe. All monies and funds dedicated and applied by this act to the purposes thereof are primarily consecrated to the payment of the interest on said bonds, and the redemption of the principal thereof, as hereinafter provided, but any surplus of said funds inuring to said Commission from taxes of 1899, 1900, 1901 and 1902, and from other sources prior to

January 1st, 1903, not required to pay current interest on said bonds, may be used for the general purposes of said Commission. The Commission, after year 1920, shall have the right, and it shall be its duty, to call in and pay not exceeding two hundred thousand dollars of said bonds in July of each year, and in the order of their issue, beginning with number one. The numbers of the bonds so called in, together with notice that said bonds will be paid on the ensuing first of January, and that interest thereon will then cease, shall be published in a New Orleans newspaper for thirty days. Said Commission may also agree with any holder of said bonds that the same may be called in at any time after November 1, 1899. Any bonds which may be hereafter authorized in excess of above amount of $1,500,000 shall be subordinate to issue above limited.

SEC. 7. Be it further enacted, etc., That all the provisions of this act, respecting the dedication and application of funds and monies shall constitute a contract primarily with the holder or holders of said bonds, as aforesaid, to the extent aforesaid, and also with each and every person or corporation that may have entered into contracts with the said Commission; and the obligation of said contract as to dedication and application of funds and monies shall not be impaired, and may be enforced by any holder of said bonds, or by any contract creditor of said Commission, by proceedings of mandamus and injunction, or by other proper proceedings in court.

And in case said Drainage Commission shall cease to exist for any cause prior to the full payment of said bonds in principal and interest, or shall fail to comply with the provisions of this act in regard to the application of said

funds and money, the Board of Liquidation of the City Debt shall be charged with the right and duty of applying said funds and monies to the payment of said bonds in principal and interest according to the provisions and intent of this act.

SEC. 8. Be it further enacted, etc., That said Commission shall have power to employ such engineers and counsel as it may find necessary in the progress and execution of its work, and shall have the power to expropriate property according to existing laws by legal proceedings in its name, in the Parishes of Orleans, Jefferson or St. Bernard; and the right in all streets and in and over all lands of the State in the Parish of Orleans and of the City of New Orleans, and in and over all lands of the State in the Parishes of Jefferson and St. Bernard, is hereby granted to said Commission for any of its works. Said Commission shall also have the right to arrange its power houses and the disposition of the electric energy thereby generated, in such way, and to construct such conductors, motors, flushing apparatus and other appliances, as will enable the City of New Orleans to flush gutters from the Mississippi River.

Approved July 9, 1898.